MOTION FILED
NOV 21 1997

(3)

No. 97-520

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL AMERICAN LIFE INSURANCE COMPANY
*Petitioners*,

v.

IT CORPORATION, *et al.*,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN COUNCIL ON LIFE INSURANCE AND THE HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AND THE HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

The American Council of Life Insurance ("ACLI") and the Health Insurance Association of America ("HIAA") hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Counsel for the Petitioner has consented to the filing of this brief; counsel for the Respondents has refused consent.

ACLI represents 557 member companies that underwrite most of the nation's life and health insurance. HIAA represents more than 250 health insurance companies that cover more than 60 million Americans and that also write roughly half of the disability insurance in the United States.

As insurers, ACLI's and HIAA's member companies provide insurance benefits through employee benefit plans governed by ERISA. More specifically, many of the member companies act as Third Party Administrators ("TPAs") of ERISA benefit plans and are thus directly affected by the Ninth Circuit's decision and its far-reaching ramifications for the TPAs of such plans.

For this reason, the legal and practical consequences of the Ninth Circuit's decision are of grave concern to ACLI, HIAA, and their member companies. By imposing fiduciary status on parties that perform purely administrative, ministerial claims services, this decision, if left intact, effectively will eliminate uniformity in ERISA statutory interpretation, since the decision conflicts with the decisions of seven other federal circuit courts. It will also increase the costs of ERISA plan administration and, in some cases, may deprive ERISA benefit plans and their beneficiaries of efficient, expert administration. ACLI and HIAA seek to provide the Court with the unique perspective of their broad-based constituencies on this important federal question.

For these reasons, ACLI and HIAA respectfully request that the Court grant this motion for leave to file the attached brief

*amici curiae* in support of the petition for certiorari and that the Court accept that brief for filing.

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## INTEREST OF *AMICI CURIAE*[1]

The American Council of Life Insurance ("ACLI") and the Health Insurance Association of America ("HIAA") represent the nation's providers of life, disability, health and other insurance. ACLI represents 557 member companies that underwrite most of the nation's life and health insurance. HIAA represents more than 250 health insurance companies that cover more than 60 million Americans and that also write roughly half of the disability insurance in the United States.

As insurers, ACLI's and HIAA's member companies provide insurance benefits through employee benefit plans governed by ERISA. More specifically, many of the member companies act as Third Party Administrators ("TPAs") of ERISA benefit plans and are thus directly affected by the Ninth Circuit's decision and its far-reaching ramifications for the TPAs of such plans.

For this reason, the legal and practical consequences of the Ninth Circuit's decision are of grave concern to ACLI, HIAA, and their member companies. By imposing fiduciary status on parties that perform purely administrative, ministerial claims services, this decision, if left intact, effectively will eliminate uniformity in ERISA statutory interpretation, because the decision conflicts with the decisions of seven federal circuit courts. It will also increase the costs of ERISA plan administration and, in some cases, deprive ERISA benefit plans and beneficiaries of efficient, expert administration. ACLI and HIAA seek to provide the Court with the unique perspective of their broad-based constituencies on this important federal question.

## INTRODUCTION AND SUMMARY

Contrary to each of the seven other circuits that have considered whether entities that perform only claims-handling and payment duties are ERISA fiduciaries, the Ninth Circuit concluded here that a Third Party Administrator performing such

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[1] No counsel for any party had any role in authoring this brief, and no person other than the named *amici* and their counsel made any monetary contribution to its preparation and submission.

duties had "discretionary authority or discretionary responsibility" over plan administration, because, in the court's view, its claims decisions must have involved plan interpretation and judgment. See Petitioner's Appendix ("Pet. App.") at 9a. This decision conflicts not only with prior decisions of the Second, Third, Fourth, Sixth, Seventh, Eighth, and Eleventh circuits, but also ignores applicable regulatory guidance and, in the end, amounts to an impermissibly broad reading of the statutory definition of "fiduciary."

Moreover, in addition to raising fundamental concerns regarding the uniformity of ERISA statutory interpretation, the Ninth Circuit's decision has serious practical consequences for ERISA plan sponsors, TPAs, and ERISA plan beneficiaries. Ordinarily, plan sponsors and TPAs contractually allocate among themselves the various ERISA benefit plan duties and obligations, with TPAs agreeing to provide ministerial services while plan sponsors reserve to themselves discretionary authority under the plans. Once the plain language contained in such agreements no longer suffices to limit the breadth of the parties' rights and obligations, TPAs and other contract service providers will have lost the power to define and control their legal status and thereby limit their potential liability under federal law. As a result, TPAs may either cover the risk of greater liability by charging substantially more for their services — thus increasing plan administrative costs — or refuse some clients altogether, thereby depriving employers and, ultimately, beneficiaries, of efficient, expert plan administration.

For these reasons, this Court should grant certiorari to consider this important federal question.

## REASONS FOR GRANTING THE PETITION

### I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF SEVEN OTHER COURTS OF APPEALS HOLDING THAT PROVIDERS OF INITIAL CLAIMS-HANDLING AND PAYMENT SERVICES IN ACCORDANCE WITH PLAN RULES ARE NOT ERISA FIDUCIARIES.

The Court should grant certiorari in this case to resolve a conflict among the circuit courts of appeals regarding the definition of "fiduciary" under ERISA law. Specifically, the Ninth Circuit's decision to impose fiduciary status on a contract service provider based solely on its initial claims processing and payment responsibilities under an ERISA benefit plan conflicts with the decisions of seven other circuits, all of which hold that such routine claims handling and payment do not involve sufficient discretion to establish fiduciary status under ERISA § 3(21)(A).

The fact that at least eight federal circuits have considered this issue over the last decade highlights not only its intrinsic significance to employee benefit plan administrators, but also its importance to the insurance industry as a whole. The federal circuit conflict created by the Ninth Circuit's decision below is sure to trigger uncertainty, and consequently increased litigation, about this fundamental and recurring issue. A final decision by this Court resolving that conflict would obviate the need for much of that litigation.

Establishing fiduciary status for ERISA purposes turns on a party's exercise of discretion over plan administration or plan assets. By its plain terms, ERISA § 3(21)(A) provides that a party is a fiduciary only

> to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) [he renders investment advice] . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A) (1994).

Seven circuit courts have held that, as a matter of law, this definition does *not* include entities performing initial claims-handling and payment activities under ERISA plans where these activities are circumscribed by employer-established plan rules and do not entail final discretionary authority. For example, in *Klosterman v. Western General Management, Inc.*, 32 F.3d 1119 (7th Cir. 1994), the Seventh Circuit considered whether TPA Western General, which contracted with employer Prairie Maize Company to administer its employee benefit plan, was a fiduciary under ERISA § 3(21)(A). Under the contract, Western General was responsible for routine claims determinations, which included processing and paying claims according to set rules and procedures established by the employer. *Id.* at 1124. The court concluded that these activities do not involve "discretionary authority" as that term is used in ERISA § 3(21)(A). The court emphasized that because the employer — not Western General — retained authority to decide all doubtful or contested claims, Western General was not an ERISA fiduciary. *Id.*

Six other circuits have reached the same conclusion. *See, e.g., Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 21 (2d Cir. 1996) (employer not a fiduciary because its duties were not "discretionary" within the meaning of ERISA § 3(21)(A)); *Confer v. Custom Eng'g Co.*, 952 F.2d 34, 39 (3d Cir. 1991) (TPA that performed purely ministerial tasks such as claims processing and calculation and that was obligated to follow the written plan instrument did not have a discretionary role and thus was not a fiduciary); *HealthSouth Rehab. Hosp. v. American Nat'l Red Cross*, 101 F.3d 1005, 1007-09 (4th Cir. 1996) (insurance company with authority to determine eligibility for and pay benefits subject to the employer's right to modify such determinations not an ERISA fiduciary), *cert. denied*, 117 S. Ct. 2432 (1997); *Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 452-56 (6th Cir. 1991) (per curiam) (TPA that processed and paid claims for a self-funded plan not a fiduciary where plan named employer fiduciary and employer reserved the right to construe the plan); *Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214, 216-17 (8th

Cir. 1993) (insurance company that did "nothing more than perform its normal contractual claims handling function," including initial claims processing and payment, not a fiduciary); *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288, 291-92 (11th Cir. 1989), (administrator that processed claims and paid benefits pursuant to an employee benefit plan not a fiduciary); *see also Santana v. Deluxe Corp.*, 920 F. Supp. 249, 254 (D. Mass. 1996) (noting that courts have universally ruled that third parties that provide claims-processing and other administrative services to employee benefit plans are not fiduciaries of the plans).[2]

These decisions are consistent with not only the statute's plain words, but also with the interpretive guidance provided by the Department of Labor, the federal agency responsible for ERISA interpretation and enforcement, as to the meaning of the term "fiduciary." *See generally*, 29 C.F.R. § 2509.75-8. These regulations provide that parties performing "purely ministerial" functions are not ERISA fiduciaries. *Id.* at § 2509.75-8, D-2. The term "ministerial functions" includes, *inter alia*, determining participation or benefits eligibility, maintaining service and employment records, calculating benefits, and processing claims. *See* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); 29 C.F.R.

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[2] Moreover, courts have also held that, to satisfy ERISA § 3(21)(A)'s "discretionary authority" requirement for fiduciary status, an entity must have ultimate authority to conduct the ERISA appeals procedures for denied claims under ERISA § 503, 29 U.S.C. § 1133. These courts have made clear that only those entities with *final* authority to review denied claims are fiduciaries under ERISA. *See, e.g, Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288, 290 (11th Cir. 1989) (claims-handling TPA was not a fiduciary where it had "not been granted the authority to review benefits denials and make the ultimate decisions regarding eligibility"); *Libbey-Owens-Ford Co. v. Blue Cross & Blue Shield Mut.*, 982 F.2d 1031, 1032 (6th Cir. 1993) (Blue Cross was a fiduciary because it "retained authority to resolve all disputes regarding coverage"). In most cases, including the case at bar, TPAs and other contract services providers do not possess this authority.

§ 2509.75-8, D-2. An entity performing these functions is not a fiduciary because it does not have the requisite "discretionary authority or discretionary control" over plan management or plan assets under ERISA § 3(21)(A), does not "render investment advice" regarding plan money or property, and "has no authority or responsibility to do so." 29 C.F.R. § 2509.75-8, D-2.

Notwithstanding the law in every other circuit to have decided this issue, not to mention the DOL's clear regulatory guidance, the Ninth Circuit incorrectly refused to hold that, as a matter of law, General American ("GA") is not an ERISA fiduciary. The court below concluded that GA may qualify for fiduciary status even though under the Administrative Services Agreement ("ASA") that governs the relationship between GA and the IT Corporation ("IT"), GA had authority to perform only customary TPA duties such as routine claims-handling and payment in accordance with the plan's established eligibility rules. The ASA plainly does not give GA the authority to (1) interpret or construe the plan; (2) resolve appeals of denied claims; or (3) review and decide disputed claims, whereas IT did have such authority.[3] See

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[3] Indeed, § 5(o) of the ASA provides that GA was to perform "purely ministerial functions for the Client (IT) within a framework of policies, interpretations, rules, practices and procedures made by the Client." Pet. App. 30a. The ASA (Appendix C) further provides that "[a]ll contested or doubtful claims or benefits amounts" are to be "referred to the Client for its determination of liability and instruction to the Service Contractor." *See* Brief of ACLI and HIAA as *Amici Curiae* in Support of Appellee's Petition for Rehearing *En Banc*, at Exhibit 2, p. 19 (filed June 13, 1997).

Moreover, § 5.1 of the Plan Document expressly identifies IT as Plan Administrator with final authority to "construe and interpret the terms of the Plan, and resolve any disputes which may arise with regard to the rights of persons covered under the Plan." Pet. App. 23a. Specifically, IT's authority includes the power to determine "eligibility for participation and claims for benefits," which confirms that IT, as the employer — not GA — is ultimately responsible for reviewing and deciding claims that plan participants allege were handled incorrectly. As such, IT is the only ERISA "fiduciary" under the Plan.

Pet. App. 27a-30a. In short, the ASA nowhere provides — or in any way indicates — that GA shall act as plan fiduciary. Instead, the ASA expressly provides that "under no circumstances shall the Service Contractor [GA] be considered the named fiduciary under the Plan."[4] Pet. App. 30a.

Thus, in an overly-broad reading of ERISA §3(21)(A), the Ninth Circuit concluded that an entity with authority under the ASA to perform only ministerial tasks, such as routine claims processing and payment, may achieve fiduciary status by virtue of its authority to decide whether certain claims should be referred to the employer for review. Pet. App. 7a-8a. In the Ninth Circuit's view, even such limited decisions could confer sufficient "discretionary authority" upon TPAs to transform them into fiduciaries. The court reached this conclusion even though it conceded that GA arguably had no "final authority" to authorize or disallow benefits in disputed cases. *Id.* at 8a-9a. By reading ERISA's definition of "fiduciary" with "uncritical literalism," *see New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1996), the Ninth Circuit ignored Congress's intent to impose fiduciary obligations only on persons who exercise a certain threshold level of discretion in claims processing and payment, not those who merely perform the routine, ministerial tasks performed by GA here. While contract service providers necessarily exercise a

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[4] The Ninth Circuit ought not to have dismissed the party's written agreements so readily. To the contrary, courts routinely look to these agreements to determine whether their provisions confer sufficient discretion upon a party to give rise to ERISA fiduciary status. *See, e.g., Harris Trust and Savings Bank v. Provident Life and Accident Ins. Co.*, 57 F.3d 608, 613 (7th Cir. 1995) (relying on specific provisions in ASA to determine that a TPA exercised no discretion in administration of benefit plan, and therefore was not a fiduciary); *Kyle Railways, Inc. v. Pacific Admin. Servs., Inc.*, 990 F.2d 513, 516 (9th Cir. 1993) (holding ERISA health plan administrator was not a fiduciary based on plain language of ASA); *see also Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 455-56 (6th Cir. 1991).

certain amount of judgment in determining claims eligibility, this "discretion" is significantly tempered and constrained by the plan's established framework of rules and policies.

Because the Ninth Circuit's decision, including both its reasoning and its ultimate conclusion, conflict with nearly a decade of federal law on this issue and, indeed, conflict with each and every circuit court to have considered this issue, the *amici* urge the Court to grant certiorari to resolve this conflict.

## II. THE CONSEQUENCES OF THE NINTH CIRCUIT'S HOLDING, IF LEFT INTACT, WILL BE PROFOUND AND PERNICIOUS.

The Ninth Circuit's decision that GA — a TPA responsible for initial claims-handling and payment under plan rules — is an ERISA fiduciary has serious implications for ERISA plans across the nation. This decision will make it difficult for many plan sponsors and beneficiaries to continue to enjoy the benefits of experienced professional TPAs or other outside claims-handling agents. If service contract providers performing ministerial administrative duties are subject to ERISA fiduciary liability, such services, which have become essential to many employers, may become less available or cost prohibitive. Employers facing skyrocketing costs of plan administration could either forego professional TPA services — resulting in inconsistent and inefficient claims handling — or eliminate employee benefit plans altogether. Either way, both employers and plan beneficiaries ultimately would pay the price of poor plan administration.

### A. Treating TPAs As ERISA Fiduciaries Will Result In Substantial Increases In Plan Administrative Costs That Will Be Passed On To Consumers.

ERISA fiduciaries are subject to liability for any losses to a plan caused by any action deemed a breach of fiduciary duty, and may also be subject to other legal and equitable remedies as well. *See, e.g.*, § 405, 29 U.S.C. § 1105 (liability for breach of co-fiduciary), § 409, 29 U.S.C. § 1109 (liability for breach of fiduciary duty) and § 502, 29 U.S.C. § 1132 (civil enforcement).

Under the Ninth Circuit's decision below, a TPA — with virtually no independent authority under the plan — could be subject to such liability. This result will plainly increase the already substantial administrative costs of such plans.

The average cost of plan administration by a TPA is approximately 4.7% of paid claims. Julie K. Swedback, *The Deemer Clause: A Legislative Savior for Self Funded Health Insurance Plans Under the Employee Retirement Income Security Act of 1974*, 18 Wm. Mitchell L. Rev. 757, 759 (1992). This number represents a relatively small fraction of employer costs incurred to provide employee benefits plans. If the Ninth Circuit's decision stands, these TPA administrative fees certainly will increase, making the cost of health care — already expensive — even higher for plan beneficiaries. These increased costs would negatively affect tens of millions of Americans who receive health benefits through self-funded employee benefits plans.[5] In many cases, the costs will become prohibitive, forcing some employers to forego completely hiring professional administrators, such as TPAs, for their plans.

**B. Subjecting TPAs To Increased Liability As Plan Fiduciaries May Force Them To Refuse Services To Prospective Clients, Depriving Plans, Employers, And Beneficiaries Of Expert Administration.**

Thousands of firms hire TPAs to administer their employee welfare benefit plans. Indeed, over 90% of all such plans are administered by either commercial insurers or TPAs. *See* 1996 Foster Higgins National Survey of Employer-Sponsored Health Plans 18-19, Brief of ACLI and HIAA as *Amici Curiae* in Support of Appellee's Petition for Rehearing *En Banc* at Exhibit 5 (filed June 13, 1997). In 1991, Aetna reported that 65% of its business results from TPA services, a figure that certainly has

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[5] More than 159 million individuals nationwide are covered by private sector group health care plans. *Statistical Abstract of the United States* at 120 (116th ed. 1996).

increased through the present. *See* Christine Woolsey, *More Small Firms Self-Fund Benefits*, Bus. Ins., Jan. 28, 1991, at 3, 12.

The reason so many employers hire TPAs is for the expert, cost-efficient administrative services that they provide. These services include custom-designed plans according to plan sponsors' needs and desires, maximum opportunity for cost-containment through more efficient, accurate claims processing, the ability to more easily identify errors and abuses that comes with personalized (and often geographically close) service, legislative and regulatory oversight, as well as uniform and comprehensive compliance with the hundreds of governmental regulatory and legislative changes mandated each year.[6]

Under the Ninth Circuit's reasoning, every insurer or non-insurance company that contracts to serve as a TPA of an ERISA benefit plan risks incurring the obligations — and concomitant potential liability — imposed upon ERISA fiduciaries, regardless of the parties' expectations as embodied in the agreement governing their relationship. If these firms are burdened with unavoidable fiduciary obligations for which they did not bargain, they may reject some clients, thus depriving employers and, ultimately, beneficiaries of efficient, expert plan administration.

Furthermore, without professional TPA services, some employers will be unable to afford self-funded employee benefit plans — resulting in less available or more expensive health care for America's workers — while others may attempt to manage

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[6] TPAs also typically perform any number of other valuable functions in administering a plan, including, for example:

- answering inquiries from participants about benefits provided;
- receiving claims and claims documents and verifying eligibility for benefits; and
- processing and issuing claim checks or drafts to participants, hospitals, doctors or others.

their plans in-house, which is sure to result in less efficient and, ultimately, more costly administration of health benefit plans.

## CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant certiorari in this case.

Respectfully submitted,

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